Filed 2/4/19 P. v. Collins CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CARLA ROSE COLLINS, Defendant and Appellant.	E069430 (Super.Ct.Nos. RIF1701190 & BAF1700728) OPINION

APPEAL from the Superior Court of Riverside County. Mark E. Johnson, Judge. Affirmed in part, remanded with directions in part.

Linda M. Cuny, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Paige B. Hazard, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Defendant and appellant Carla Rose Collins challenges a number of her probationary terms and conditions, arguing they are unconstitutionally vague, overbroad, and violate the separation of powers and the rights to travel and association. The People agree that the condition requiring defendant to report contact with law enforcement should be modified, but argue defendant's remaining claims are without merit. We agree with the parties that the condition requiring defendant to report contact with law enforcement must be modified and remand the matter to allow the trial court to modify the condition. We reject defendant's remaining contentions and otherwise affirm the judgment.

II

FACTUAL AND PROCEDURAL BACKGROUND

A. Case No. RIF1701190[1]

On January 4, 2017, with a blood alcohol content of 0.249 percent, defendant repeatedly drove into a closed gate in order to gain access to a fenced-in property. Defendant caused approximately $2,000 in damages to the fence.

[1] The factual background in case No. RIF1701190 is taken from the preliminary hearing transcript as the parties stipulated to the preliminary hearing transcript for the factual basis for the plea.

On April 5, 2017, a felony complaint was filed charging defendant with felony vandalism (Pen. Code,[2] § 594, subd. (a); count 1), driving a vehicle while under the influence of alcohol (Veh. Code, § 23152, subd. (a); count 2), and driving a vehicle while having a blood alcohol content of 0.08 or greater (Veh. Code, § 23152, subd. (b); count 3). As to counts 2 and 3, the complaint also alleged that defendant's blood alcohol content was 0.20 or greater (Veh. Code, § 23538, subd. (b)(2)). The complaint further alleged that defendant had suffered one prior strike conviction (Pen. Code, §§ 667, subds. (c) & (e)(1), 1170.12, subd. (c)(1)) and four prior prison terms (§ 667.5, subd. (b)).

On June 21, 2017, pursuant to a plea agreement, defendant pled guilty to counts 1 and 2, and admitted her blood alcohol content was 0.20 or greater, with the agreed-upon maximum sentence of three years six months. In exchange, the remaining charge and enhancement allegations were dismissed, and defendant was placed on probation for a period of 36 months on various terms and conditions of probation, including serving 180 days in the county jail. Defendant did not object to the terms and conditions of her probation, and explicitly agreed to accept her probationary terms and to follow all of them.

On June 30, 2017, defendant was placed in the Riverside Alternative Sentencing Program. In connection with the program, she was placed on home detention and required to wear an ankle bracelet monitor.

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[2] All future statutory references are to the Penal Code unless otherwise stated.

B. Case No. BAF1700728[3]

On July 3, 2017, defendant escaped from home detention.

On July 5, 2017, while on probation in case No. RIF1701190, a felony complaint was filed charging defendant with escaping from home detention in violation of section 4532, subdivision (b)(1). The felony complaint was amended on August 1, 2017, to include defendant's five prior prison terms (§ 667.5, subd. (b)) and one prior strike conviction (§§ 667, subds. (c) & (e)(1), 1170.12, subd. (c)(1)).

On September 25, 2017, the trial court granted defendant's motion to strike her prior strike conviction pursuant to section 1385.

On September 28, 2017, defendant pled guilty to escaping from home detention in violation of section 4532, subdivision (b)(1). On that same day, defendant also admitted to violating her probation in case No. RIF1701190. In return, the remaining enhancement allegations were dismissed, and defendant was placed on formal probation for a period of three years on various terms and conditions of probation, including serving 335 days in county jail, to run concurrent with case No. RIF1701190. Defendant did not object to the terms and conditions of her probation, and explicitly agreed to accept all of her probationary terms and conditions. In case No. RIF1701190, the trial court reinstated defendant on probation with the same terms and conditions, with the exception of serving an additional 185 days in county jail, to run concurrent with case No. BAF1700728.

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[3] The factual background in case No. BAF1700728 is taken from amended felony complaint as the parties stipulated to the complaint for the factual basis for the plea.

On October 30, 2017, defendant filed a notice of appeal in both cases.

III

DISCUSSION

At the September 28, 2017 sentencing hearing in case Nos. BAF1700728 and RIF1701190, the trial court imposed the following challenged probation conditions: (1) "Participate and complete at your expense any counseling, rehabilitation/treatment program deemed appropriate by probation officer; and authorize release of information relative to progress" (hereafter Treatment Condition); (2) "Report any law enforcement contacts to Probation Officer within 48 hours" (hereafter Police Contact Reporting Condition); (3) "Inform the probation officer of your place of residence and reside at a residence approved by the probation officer"; "Give written notice to the probation officer 24 hours before changing your residence and do not move without the approval of the probation officer" (hereafter Residency Approval Conditions); (4) "Submit to immediate search/property including all residence/premises/storage units, containers and vehicles under your control; by Probation Officer or law enforcement officer; with or without cause" (hereafter Search Condition); and (5) "Do not associate with any unrelated person you know to be on either probation, parole, mandatory supervision, post community supervision or a gang member"; "Do not associate with any unrelated person you know to be a possessor, user or trafficker of controlled substance" (hereafter No-Contact Conditions).

Defendant argues that the above-noted probationary terms and conditions are unconstitutionally vague, overbroad, and/or violate the separation of powers doctrine and her rights to travel and association. She, therefore, believes the challenged conditions must either be stricken or modified. The People agree that the Police Contact Reporting Condition must be modified, but otherwise urge the court to reject defendant's remaining claims.

A. *Relevant Law and Standard of Review*

"When an offender chooses probation, thereby avoiding incarceration, state law authorizes the sentencing court to impose conditions on such release that are 'fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and . . . for the reformation and rehabilitation of the probationer.'" (*People v. Moran* (2016) 1 Cal.5th 398, 402-403, quoting § 1203.1, subd. (j).) Thus, "a sentencing court has 'broad discretion to impose conditions to foster rehabilitation and to protect public safety pursuant to Penal Code section 1203.1.'" (*Moran*, at p. 403, quoting *People v. Carbajal* (1995) 10 Cal.4th 1114, 1120 (*Carbajal*).) "If a probation condition serves to rehabilitate and protect public safety, the condition may 'impinge upon a constitutional right otherwise enjoyed by the probationer, who is "not entitled to the same degree of constitutional protection as other citizens."'" (*People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1355 (*O'Neil*), quoting *People v. Lopez* (1998) 66 Cal.App.4th 615, 624 (*Lopez*).)

Judicial discretion in selecting the conditions of a defendant's probation "is not unlimited." (*O'Neil, supra,* 165 Cal.App.4th at p. 1355.) A probation condition is unreasonable and will not be upheld if it (1) has no relationship to the crime of which the defendant was convicted, (2) relates to conduct that is not criminal, and (3) requires or forbids conduct that is not reasonably related to future criminality. (*People v. Olguin* (2008) 45 Cal.4th 375, 379-380 (*Olguin*); *O'Neil*, at p. 1355.) "This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term." (*Olguin*, at p. 379.) Thus, as a general rule, "even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality." (*Id*. at p. 380.)

However, "[j]udicial discretion to set conditions of probation is further circumscribed by constitutional considerations." (*O'Neil, supra,* 165 Cal.App.4th at p. 1356.) Under this second level of scrutiny, if an otherwise valid condition of probation impinges on constitutional rights, the condition must be carefully tailored so as to be reasonably related to the compelling state interest in the probationer's reformation and rehabilitation. (*Ibid*.; *People v. Bauer* (1989) 211 Cal.App.3d 937, 942 (*Bauer*); *In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*); *In re Victor L.* (2010) 182 Cal.App.4th 902, 910.) "The essential question . . . is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is

impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

Challenges to probation conditions ordinarily must be raised in the trial court or appellate review of those conditions will be deemed forfeited. (*People v. Welch* (1993) 5 Cal.4th 228, 234-235 (*Welch*) [extending the forfeiture rule to a claim that probation conditions are unreasonable, when the probationer fails to object on that ground in the trial court].) On the other hand, the forfeiture rule does not apply, and a defendant who did not object to a probation condition at sentencing may do so on appeal if the appellate claim "amount[s] to a 'facial challenge'" that challenges the condition on the ground its "phrasing or language . . . is unconstitutionally vague or overbroad" and the determination whether the condition is constitutionally defective "does not require scrutiny of individual facts and circumstances but instead requires the review of abstract and generalized legal concepts—a task that is well suited to the role of an appellate court." (*Sheena K.*, *supra*, 40 Cal.4th at pp. 885, 887.) Thus, a challenge to a probation condition on the ground it is unconstitutionally overbroad or vague "that is capable of correction without reference to the particular sentencing record developed in the trial court can be said to present a pure question of law" (*id.* at p. 887, italics omitted), and such a challenge is reviewable on appeal even if it was not raised in the trial court (*id.* at p. 889).

Defendant raised no objection in the trial court with respect to the above challenged conditions. Nevertheless, to the extent defendant raises a facial challenge to

the constitutional validity of the challenged probation conditions, the claims are not forfeited by defendant's failure to raise it below and we will reach the merits of defendant's claims. (*Sheena K.*, *supra*, 40 Cal.4th at pp. 888-889.) We, however, focus solely on the constitutionality of the challenged conditions, not whether they are reasonable as applied to defendant. (See *People v. Lent* (1975) 15 Cal.3d 481, 486 [test for reasonableness of probation conditions].) By failing to object below, defendant has forfeited all claims except a challenge "based on the ground the condition is vague or overbroad and thus facially unconstitutional." (*Sheena K.*, at p. 878.)

Trial courts must fashion precise supervision conditions so the probationer knows what is required. (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) A condition is invalid if it is """"so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."""" (*People v. Quiroz* (2011) 199 Cal.App.4th 1123, 1128.) Nor may a court impose overbroad supervision conditions. Where a condition impinges on a constitutional right, it must be carefully tailored and reasonably related to the compelling state interest in reformation and rehabilitation. (*Ibid.*; *Sheena K.*, at p. 890.) A "court may leave to the discretion of the probation officer the specification of the many details that invariably are necessary to implement the terms of probation. However, the court's order cannot be entirely open-ended." (*O'Neil*, *supra*, 165 Cal.App.4th at pp. 1358-1359 [probation condition forbidding defendant from associating with all persons designated by his probation officer was "overbroad and permit[ted] an unconstitutional infringement on defendant's right of association"].) "If a probation

condition serves to rehabilitate and protect public safety, the condition may 'impinge upon a constitutional right otherwise enjoyed by the probationer, who is "not entitled to the same degree of constitutional protection as other citizens."'" (*Id*. at p. 1355, quoting *Lopez, supra,* 66 Cal.App.4th at p. 624.)

"Generally, we review the court's imposition of a probation condition for an abuse of discretion." (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143, citing *Carbajal, supra,* 10 Cal.4th at p. 1121.) However, we independently review constitutional challenges to a probation condition. (*In re Shaun R.*, at p. 1143.) Based on the foregoing, we address the merits of defendant's arguments *post*.

B. *Treatment Condition*

Defendant contends that the Treatment Condition requiring her to "participate and complete at [her] expense any counseling, rehabilitation/treatment program deemed appropriate by probation officer" is vague because it does not provide her notice as to the type, scope, and conditions of treatment she would be required to attend. Specifically, she argues that the condition did not "sufficiently apprise [her] of the burdens she was assuming, and did not sufficiently fix a standard to determine whether she has satisfied the condition." She also asserts the condition is overbroad because it is not narrowly tailored and reasonably related to her rehabilitation. For the reasons explained below, we reject these contentions.

Subdivision (a) of section 1202.8 states that "[p]ersons placed on probation by a court shall be under the supervision of the county probation officer who shall determine

both the level and type of supervision consistent with the court-ordered conditions of probation." Subdivision (a) of section 1203 provides in part, "'probation' means the suspension of the imposition or execution of a sentence and the order of conditional and revocable release in the community under the supervision of a probation officer."

Taken together, these statutes provide that the court orders conditions of probation and the probation officer supervises compliance with them. The conditions do not constitute a delegation of the court's authority to order probation conditions; rather, the court has already ordered the conditions. Where a court-ordered probation condition provides it applies if "deemed appropriate" by the probation officer, the court has merely vested the probation officer with the power to set the time and place for administration of these court-ordered probation conditions based on the probation officer's statutory authority to "determine both the level and type of supervision consistent with the court-ordered conditions of probation." (§ 1202.8, subd. (a); *People v. Kwizera* (2000) 78 Cal.App.4th 1238, 1240 (*Kwizera*) ["When the clear words of Penal Code sections 1202.8 and 1203 are applied, the trial court has authority to empower the probation department with authority to supervise the probation conditions."].) As our high court observed in *Olguin, supra*, 45 Cal.4th 375, the probation department's authority to supervise compliance with the conditions of probation does not empower the department to engage in irrational conduct or make irrational demands. (*Id*. at p. 383.) Thus, we reject defendant's claim that "[w]hile this court may anticipate that [defendant's] probation officer would act competently and require enrollment in a

program related to alcohol treatment, such a hope and expectation that a probation officer act reasonably in making its decisions does not save facially overbroad language of a probation condition."

For those if "deemed appropriate" or "if directed" conditions requiring participation in court-ordered programs, another court has noted that "[t]he trial court is poorly equipped to micromanage selection of a program, both because it lacks the ability to remain apprised of currently available programs and, more fundamentally, because entry into a particular program may depend on mercurial questions of timing and availability." (*People v. Penoli* (1996) 46 Cal.App.4th 298, 308 (*Penoli*).) Even if the court could be more specific in its order, that does not necessarily render a condition overbroad. (*Ibid.* ["Desirable as such a narrowing of the probation officer's discretion might be, however, we are not prepared at this time to hold that its absence constitutes prejudicial error."])

As the *Penoli* court noted, "[a] defendant who is concerned about particular risks can bring those concerns to the court's attention at or prior to sentencing, asking it (for instance) to approve or disapprove specific programs identified by the defense. Failing that, the defendant can seek judicial intervention—by moving to modify the probation order, if nothing else—if and when the probation officer seeks to exercise the delegated authority. (See § 1203.3.)" (*Penoli*, *supra*, 46 Cal.App.4th at p. 308.)

The if "deemed appropriate" or "if directed" conditions are not unconstitutionally vague. As previously noted, to avoid a challenge of vagueness, the condition "must be

sufficiently precise for the probationer to know what is required of him [or her], and for the court to determine whether the condition has been violated." (*People v. Reinertson* (1986) 178 Cal.App.3d 320, 324-325.) The *Penoli* court found that notice was satisfied if the probationer's trial attorney had actual knowledge of what the program ordered by the court would typically entail in terms of treatment and duration. (*Penoli*, *supra*, 46 Cal.App.4th at p. 309.) Such an order also does not have to be specific regarding how compliance with the program will be assessed since it is ultimately up to the sentencing court to determine compliance with conditions of probation, not the probation officer. (*Id*. at p. 310.)

Defendant's reliance on *Penoli* is misplaced. The court in *Penoli* did not find a treatment condition to be facially unconstitutional. Rather, the *Penoli* court explained that the probationer was not "completely at the mercy of the probation department" because the probationer could seek judicial intervention by moving to modify the probation order, if, and when, the probation officer seeks to exercise that authority. (*Penoli*, *supra*, 46 Cal.App.4th at p. 308, citing § 1203.3; see *In re Moriah T.* (1994) 23 Cal.App.4th 1367, 1375, 1377.) The *Penoli* court recognized that probation officers possess some discretion in deciding when a probationer would participate in a residential treatment program and in program selection. (*Penoli*, at p. 308.) As noted, the trial court retains ultimate control over exercise of the probation conditions. (See §§ 1203.2, subd. (b)(1), 1203.3, subd. (a).)

We view the if "deemed appropriate" conditions in light of *Olguin* and presume a probation officer will not interpret them in an irrational or capricious manner. (*Olguin*, *supra*, 45 Cal.4th at p. 383.) If the probation officer interprets the if "deemed appropriate" conditions in any arbitrary manner, defendant could file a petition for modification of her probation condition. (See §§ 1203.2, subd. (b)(1), 1203.3, subd. (a); see *People v. Keele* (1986) 178 Cal.App.3d 701, 708 [trial court retains jurisdiction to review probation officer's actions].)

Defendant further asserts that the Treatment Condition "fails to specify the character" of the program or specify "what type of conduct the program is designed to facilitate or curtail." To the extent defendant attempts to argue the Treatment Condition was unreasonable, which is an as-applied challenge, we find defendant's argument waived because she failed to object to the reasonableness of the condition below. (*Sheena K.*, *supra*, 40 Cal.4th at p. 889.) A timely objection would have allowed the court to explain why the Treatment Condition was necessary in this case. (See *Welch*, *supra*, 5 Cal.4th at p. 235; *Sheena K.*, at p. 889.)

Notwithstanding, we note that the Treatment Condition is listed under the "Drug/Search/Test Programs Terms" section of the probation condition document. Though it does not state that the treatment program would be for drug and alcohol treatment, its placement under the drug section clearly conveys to defendant and the probation officer that the purpose of the Treatment Condition is to treat drug and alcohol addiction. (See *Penoli*, *supra*, 46 Cal.App.4th 298 [court found contested condition was

not overly broad or vague because it specified that the treatment was for drug abuse].) Defendant's convictions stemmed from crimes she committed after consuming enough alcohol to reach a 0.249 blood alcohol content. At sentencing, the court suggested that "maybe you ought not be drinking [alcohol]" because it resulted in defendant making bad decisions. With the agreement of the prosecution and defense, the court referred defendant to the Residential Substance Abuse Treatment Program, or "RSAT." The undisputed facts in the record show that defendant struggled with alcohol abuse. Thus, the Treatment Condition was neither vague nor overbroad.

Defendant also relies on *People v. Cervantes* (1984) 154 Cal.App.3d 353 to argue that the Treatment Condition violates the separation of powers doctrine. *Cervantes* is distinguishable from the present case. In *Cervantes*, the court placed the defendant on probation "on condition that he 'pay restitution in an amount and manner to be determined by the Probation Officer.'" (*Cervantes*, at p. 356.) The *Cervantes* court further stated "[w]e find no statutory provision sanctioning a delegation of unlimited discretion to a probation officer to determine the propriety, amount, and manner of payment of restitution." (*Id*. at p. 358.) In *Cervantes*, unlike this case, the trial court had allowed probation officers to make a final determination (of probation conditions) without any ensuing judicial review. (*Id*. at pp. 355-359.) We therefore reject defendant's assertion that the separations of powers doctrine was violated when the court imposed the Treatment Condition or that judicial authority was delegated to the probation officer to determine a treatment program if "deemed appropriate." The treatment

program was listed under the drug terms portion of the probation document. Moreover, the parties discussed a specific residential treatment program. Thus, defendant had notice that she could potentially be directed to complete a residential treatment program during her probationary period.

Based on the foregoing, we find the Treatment Condition is neither unconstitutionally vague nor overbroad, and it does not improperly delegate power to the probation department or violate the separation of powers.

C. *The Police Contact Reporting Condition*

Relying on *People v. Relkin* (2016) 6 Cal.App.5th 1188 (*Relkin*), defendant contends that the probation condition requiring her to report "'any law enforcement contacts to probation officer within 48 hours'" is unconstitutionally vague and overbroad. She asserts the condition is vague because it does not delineate "what type of contact with law enforcement would necessitate reporting." She further argues that the condition is overbroad because reference to "'any law enforcement'" is too broad and should be limited to incidents involving police officers. The People agree that the type of contact that requires reporting should be modified, but that the term "'law enforcement'" is commonly understood to mean sworn officers and is not overbroad.

In *Relkin*, as here, a condition of probation required that the defendant report "'any contacts with or incidents involving any peace officer.'" (*Relkin*, *supra*, 6 Cal.App.5th at p. 1196.) The court found the condition overbroad, explaining: "[T]he portion of the condition requiring that defendant report 'any contacts with . . . any peace officer' is

vague and overbroad and does indeed leave one to guess what sorts of events and interactions qualify as reportable. We disagree with the People's argument that the condition is clearly not triggered when defendant says 'hello' to a police officer or attends an event at which police officers are present, but would be triggered if defendant were interviewed as a witness to a crime or if his 'lifestyle were such that he is present when criminal activity occurs.' The language does not delineate between such occurrences and thus casts an excessively broad net over what would otherwise be activity not worthy of reporting." (*Id*. at p. 1197.) Accordingly, the *Relkin* court remanded the case to the trial court with directions to modify the condition to more clearly inform the defendant of what contacts must be reported.

Here, the condition imposed on defendant suffers from the defect identified in *Relkin*: by requiring that defendant report any contact with law enforcement, it does not differentiate between casual contact unrelated to any criminality, or even suspicion of criminality, and contact which might warrant some further investigation by a probation officer. The People concede that the police contact reporting condition in this case is nearly identical to *Relkin*, and agree the matter should be remanded. The People assert that they are also "not opposed to modified language specifying that [defendant] must report contacts related to criminal activity and arrests." We agree that such a limitation on the condition would cure its overbreadth defect by giving defendant unambiguous guidance with respect to what events she must report. However, rather than providing this limitation on the condition by way of interpretation in an appellate opinion, as a

practical matter in order to fully protect defendant's rights, this limitation on the condition should be expressly modified by the trial court. Accordingly, we will remand with directions that the Police Contact Reporting Condition be expressly modified.

D. *The Residency Approval Conditions*

Defendant argues the Residency Approval Conditions are unconstitutionally overbroad and not narrowly tailored to further a compelling state interest. Specifically, she asserts that requiring the probation officer's "approval" as to her choice of residence and her ability to relocate is overbroad and violates her rights to travel and association because it does not advance her rehabilitation or public safety. Accordingly, defendant asks this court to strike the approval language.

A restriction requiring that a probation officer approve a defendant's residence clearly imposes a burden on that defendant's constitutional rights to associate and his or her right to intrastate and interstate travel. (*Bauer, supra,* 211 Cal.App.3d at p. 944 [probation condition requiring that probation officer approve of residence "impinges on constitutional entitlements—the right to travel and freedom of association"].) Nonetheless, a probation condition may restrict these rights as long as it reasonably relates to reformation and rehabilitation. (*In re White* (1979) 97 Cal.App.3d 141, 146.)

Defendant relies on *Bauer* to argue that a probation condition that grants a probation officer unfettered discretion to approve or disapprove of a probationer's residence is facially unconstitutional. *Bauer* involved a probationer's challenge to a condition nearly identical to the one here, which requires that defendant obtain his

probation officer's approval of his place of residence. (*Bauer*, *supra*, 211 Cal.App.3d at pp. 943-945.) The *Bauer* court struck the condition, concluding that any requirement that the defendant obtain his probation officer's approval of his residence was an "extremely broad" restriction, and was not "narrowly tailored to interfere as little as possible" with the constitutional right of travel and to freedom of association. (*Id*. at p. 944.) Such a condition gave the probation officer the discretionary power to prohibit the defendant from living with or near whomever the probation officer chose—i.e., it gave the probation officer "the power to banish him." (*Ibid*.) Here, in contrast, nothing suggests the Residency Approval Conditions were designed to banish defendant from a particular neighborhood or stop her from living where she desires. (*People v. Arevalo* (2018) 19 Cal.App.5th 652, 657 (*Arevalo*); see *People v. Stapleton* (2017) 9 Cal.App.5th 989, 995 (*Stapleton*) [distinguishing *Bauer* because "residence condition imposed here is not a wolf in sheep's clothing; it is not designed to banish defendant"].)

To the extent that defendant's argument may be considered to be an *as applied* challenge to the Residency Approval Conditions on overbreadth grounds, we reject the challenge. First, the *Bauer* court did not explain whether it was considering a facial or an as-applied challenge to the residency approval condition. Second, there is no mention in *Bauer* whether the defendant had raised an objection to the condition in the trial court. Although the *Bauer* court utilized broad language, including language often used in the context of a facial overbreadth analysis, to conclude that the residency approval condition was unconstitutional in that case, it appears from the court's analysis that it made this

determination only after a particularized assessment of the application of this condition to the specific circumstances of that defendant. In fact, the *Bauer* court's conclusory constitutional analysis followed discussion of the fact that there was "nothing in the probation report or otherwise a part of the record in this case suggesting in any way that appellant's home life (which is exemplary compared to that of most convicted felons) contributed to the crime of which he was convicted." (*Bauer, supra,* 211 Cal.App.3d at p. 944.) We are unconvinced that the *Bauer* court was truly considering whether a residency approval condition was unconstitutional in every potential application, as opposed to determining that it was unconstitutional under the unique facts of that case. For this reason, we read *Bauer* to hold, narrowly, that a residency approval condition may not be constitutionally applied to a defendant where the record demonstrates that the defendant's rehabilitation would not be served by placing restrictions on his or her residency, given the specific nature of the offender and the nature of his or her offense.

Furthermore, to the extent that defendant is arguing that a residency approval probation condition is unconstitutional *as applied* to her, we conclude that she has forfeited such an argument by failing to raise it below. (See *Sheena K., supra*, 40 Cal.4th at p. 889.) Because we conclude that *Bauer* is not persuasive with respect to determining whether the challenged probation conditions are *facially* overbroad, we next consider whether review of the Residency Approval Conditions *in the abstract* reveals that it is not narrowly tailored to the state's legitimate purpose in imposing it. (See *Sheena K.*, at p. 885 [appellate claim that the language of a probation condition is unconstitutionally

vague or overbroad "does not require scrutiny of individual facts and circumstances but instead requires the review of abstract and generalized legal concepts"].) We cannot say that the Residency Approval Conditions are facially overbroad based on its language and legal concepts.

Even where a court does not provide an individualized assessment of a particular probationer's needs with respect to his or her living circumstances, the grant of discretionary authority to a probation officer includes an implicit requirement that the discretion be exercised reasonably. (See *Stapleton*, *supra*, 9 Cal.App.5th at pp. 996-997 ["A probation officer cannot issue directives that are not reasonable in light of the authority granted to the officer by the court. Thus, a probation officer cannot use the residence condition to arbitrarily disapprove a defendant's place of residence."].) We agree with our decision in *Stapleton*. A residency approval condition "does not grant a probation officer the power to issue arbitrary or capricious directives that the court itself could not order." (*Ibid*., citing *Kwizera*, *supra*, 78 Cal.App.4th at pp. 1240-1241 [probation condition requiring a probationer to obey directions from his probation officer does not give probation officer "power to impose unreasonable probation conditions"].) We therefore reject the suggestion that the Residency Approval Conditions must include probationer specific criteria in every case in order to avoid being unconstitutionally overbroad.

Further, in considering the "nature of the case," (*Stapleton*, *supra*, 9 Cal.App.5th at pp. 993-994) based on the undisputed facts and defendant's rehabilitation and public

safety, it is apparent that the Residency Approval Conditions reasonably relate to defendant's reformation and rehabilitation. As our Supreme Court has observed, "Imposing a limitation on probationers' movements as a condition of probation is common, as probation officers' awareness of probationers' whereabouts facilitates supervision and rehabilitation and helps ensure probationers are complying with the terms of their conditional release." (*Moran*, *supra*, 1 Cal.5th at p. 406.) Moreover, in a facial challenge to the constitutionality of a probation condition, it is not clear that a court is required to consider the individual defendant's rehabilitative needs. (*Stapleton*, at pp. 993-994 [distinguishing between degree of specificity required in facial versus "'as applied'" challenge to probation condition as constitutionally overbroad].) It may be sufficient to consider "the nature of the case and the goals and needs of probation in general," considering, generally, the type of crime involved. (*Ibid*.) Additionally, it is important to recognize, "probation is a privilege and not a right, and that adult probationers, in preference to incarceration, validly may consent to limitations upon their constitutional rights . . . . [Citations.]" (*Olguin*, *supra*, 45 Cal.4th at p. 384.) "If a defendant believes the conditions of probation are more onerous than the potential sentence, he or she may refuse probation and choose to serve the sentence. [Citations.]" (*Id*. at p. 379; *Stapleton*, at p. 997.)

The Residency Approval Conditions here are reasonably necessary to rehabilitate defendant and protect the public. Moreover, as our Supreme Court stated in *Olguin*, "A probation condition should be given 'the meaning that would appear to a reasonable,

objective reader.' [Citation.]" (*Olguin*, *supra*, 45 Cal.4th at p. 382.) And we presume a probation officer will not withhold approval under the Residency Approval Conditions for irrational or capricious reasons (*id.* at p. 383) and will appreciate there are limited housing options. (*Arevalo*, *supra*, 19 Cal.App.5th at p. 658.)

E. *The Search Condition*

Defendant also argues that the Search Condition, requiring her to "[s]ubmit to immediate search of person/property including at residences/premises/storage units, containers, & vehicles under your control" is overbroad because it "appears to permit unfettered governmental access to [defendant's] cell phone, computer, electronic devices, and digital media." Defendant does not challenge the actual language of the condition but asserts the condition is "overly inclusive," presuming it applies to cell phones, computers, and other electronic storage devices,[4] and infringes on her "rights of freedom from unreasonable searches and right to privacy."

Assuming, without deciding, that the Search Condition in this case includes searches of electronic devices (compare *In re I.V.* (2017) 11 Cal.App.5th 249, 262

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[4] The constitutionality of including electronics in probation search conditions is currently pending before the California Supreme Court. (See *In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted Feb. 17, 2016, S230923; *In re Alejandro R.* (2015) 243 Cal.App.4th 556, review granted Mar. 9, 2016, S232240; *In re Mark C.* (2016) 244 Cal.App.4th 520, review granted Apr. 13, 2016, S232849; *In re A.S.* (2016) 245 Cal.App.4th 758, review granted May 25, 2016, S233932; *In re J.E.* (2016) 1 Cal.App.5th 795, 800-802 (*J.E.*), review granted Oct. 12, 2016, S236628; *People v. Nachbar* (2016) 3 Cal.App.5th 1122, 1130, review granted Dec. 14, 2016, S238210; *People v. Trujillo* (2017) 15 Cal.App.5th 574 (*Trujillo*), review granted Nov. 29, 2017, S244650.)

[Fourth District, Division One held that standard search conditions authorizing searches of a probationer's person, property, and vehicle only apply to tangible physical property and not to electronic data] to *People v. Sandee* (2017) 15 Cal.App.5th 294, 306 [Fourth District, Division One later declined to follow *I.V.* because (1) its search condition was imposed after the Electronics Communications Privacy Act or ECPA became effective, and (2) *I.V.* relied on a federal case that is not controlling in California]), we reject defendant's contention that the Search Condition is unconstitutionally overbroad.

In *Riley v. California* (2014) 573 U.S. __, [134 S.Ct. 2473] (*Riley*), the court held that the search incident to arrest exception to the warrant requirement did not apply to searches of data on a cell phone seized from an arrestee. (*Id*. at p. __ [134 S.Ct. at p. 2485].) *Riley* explained the ordinary justifications for searches incident to arrest were to prevent harm to officers and destruction of evidence, but there were "no comparable risks when the search is of digital data." (*Id*. at p. __ [134 S.Ct. at pp. 2484-2485].) "Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape. Law enforcement officers remain free to examine the physical aspects of a phone to ensure that it will not be used as a weapon—say, to determine whether there is a razor blade hidden between the phone and its case. Once an officer has secured a phone and eliminated any potential physical threats, however, data on the phone can endanger no one." (*Ibid*.)

Riley weighed the government's interests against the heightened privacy interests that people have in their cell phone data. *Riley* compared cell phones to

"minicomputers," and noted both the volume of sensitive data they contain and the pervasiveness of cell phone usage. (*Riley, supra*, 573 U.S. at p. __ [134 S.Ct. at p. 2489].) Cell phone data is "qualitatively different" from physical records and could include information like location data or Internet browsing history, that would "typically expose to the government far *more* than the most exhaustive search of a house . . . ." (*Id*. at p. __ [134 S.Ct. at pp. 2490-2491].) "Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life,' [citation]. The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant." (*Id*. at p. __ [134 S.Ct. at pp. 2494-2495].) *Riley* reversed and remanded the case but emphasized that its holding was only that cell phone data is subject to Fourth Amendment protection, "not that the information on a cell phone is immune from search." (*Id*. at p. __ [134 S.Ct. at p. 2493].) "[E]ven though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone," such as the exigent circumstances exception. (*Id*. at p. __ [134 S.Ct. at p. 2494].)

In *People v. Appleton* (2016) 245 Cal.App.4th 717, the defendant was charged with sex offenses committed on a minor that he met on social media. He later pleaded guilty to false imprisonment by means of deceit and was placed on probation. (Id. at

pp. 720-721.) One of the probation conditions was for his electronic devices to be subject to "'forensic analysis search for material prohibited by law. . . .'" (*Id*. at p. 721.) *Appleton* held the search condition was valid under *Lent, supra*, 15 Cal.3d 481 because it was reasonably related to his crime. However, the *Appleton* court, relying on *Riley, supra*, 573 U.S. __ [134 S.Ct. 2473], found the search condition was unconstitutionally overbroad because it allowed "for searches of vast amounts of personal information unrelated to defendant's criminal conduct or his potential future criminality," (*Appleton*, at p. 727) such as his medical and financial records, "personal diaries, and intimate correspondence with family and friends." (*Id*. at p. 725.)

Riley does not address the constitutionality of search conditions imposed pursuant to probation or parole. The defendant in that case had not been convicted of crimes at the time of the search, and *Riley* acknowledged that there could be circumstances where a warrantless search of electronic devices would be valid. *Riley* is not applicable to defendant's case.

"Warrantless searches are justified in the probation context because they aid in deterring further offenses by the probationer and in monitoring compliance with the terms of probation. [Citations.] By allowing close supervision of probationers, probation search conditions serve to promote rehabilitation and reduce recidivism while helping to protect the community from potential harm by probationers. [Citation.]" (*People v. Robles* (2000) 23 Cal.4th 789, 795.)

As relevant to this case, the balancing of equities is fundamentally different than in *Riley* and favors the government, since a defendant has a significantly diminished expectation of privacy as a probationer and the government has a greater interest to protect the safety of the public from future criminal offenses committed by probationers.

While searches involving electronic devices may raise unique issues of privacy not found in searches of these more traditional categories, there is no reason to depart from the well-recognized treatment of search conditions when that condition implicates electronic devices. Indeed, a person's home also contains considerable personal and confidential information and is a place where a person has the absolute right to be left alone, but conditions which grant broad authority to search the home of a probationer or parolee without a warrant or reasonable cause have been upheld. (*People v. Reyes* (1998) 19 Cal.4th 743, 746, 754; *People v. Ramos* (2004) 34 Cal.4th 494, 505-506; *In re Binh L.* (1992) 5 Cal.App.4th 194, 203-205; *People v. Balestra* (1999) 76 Cal.App.4th 57, 66-68; see *United States v. Mitchell* (11th Cir. 2009) 565 F.3d 1347, 1352 [comparing "the hard drive of a computer" to the "'the digital equivalent of its owner's home, [as] capable of holding a universe of private information'"].)

In the absence of further guidance from the United States or California Supreme Court, we find the Search Condition here constitutional. "'A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.' [Citation.] 'The essential question in an overbreadth challenge is the

closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.'" (*People v. Pirali* (2013) 217 Cal.App.4th 1341, 1346.)

Here, the record reflects some evidence of the legitimate purpose of the restriction, as we have discussed above: preventing future criminality by promoting effective supervision. The condition may place a burden, in the abstract, on defendant's general right to privacy based on the possibility of a search of her electronic devices. But, as a defendant under probation supervision, her privacy rights are "diminished," i.e., they may more readily be burdened by restrictions that serve a legitimate purpose. On the current record, we conclude the burden on defendant's privacy right is insufficient to show overbreadth, given the legitimate penological purpose shown for searching defendant's electronic devices.

Additionally, as our colleagues did in *Trujillo*, we reject defendant's argument that the Search Condition is unconstitutionally overbroad as violating her fundamental privacy rights under *Riley*, *supra*, 573 U.S. __ [134 S.Ct. 2473]. In *Trujillo*, the appellate court distinguished *Riley*, and followed authority explaining that the overbreadth analysis is materially different from the warrant requirement at issue in that case. (*Trujillo*, *supra*, 15 Cal.App.5th at p. 587.) The court observed that probationers do not enjoy the absolute liberty to which law-abiding citizens are entitled, and that courts routinely uphold broad probation conditions permitting searches of a probationer's residence without a warrant

or reasonable cause. (*Id*. at pp. 587-588.) Like the defendant in *Trujillo* (*id*. at pp. 588-589), defendant has not challenged the probation condition authorizing officers to conduct random and unlimited searches of her residence at any time and for no stated reason, and she has made no showing that a search of her electronic devices would be any more invasive than an unannounced, without-cause, warrantless search of her residence. Moreover, here, the record supports a conclusion that the Search Condition is necessary to protect public safety and to ensure defendant's rehabilitation during her supervision period. Consequently, a routine search of defendant's person, property, container, or electronic data "is strongly relevant to the probation department's supervisory function." (*Id*. at p. 588.)

Furthermore, the *Riley* court did not hold that electronic devices are immune from search, but only that they cannot be searched incident to lawful arrest as an ordinary exception to the warrant requirement. (See *Riley, supra*, 573 U.S. __ [134 S.Ct. 2473].) Defendant's case does not involve an exception to the warrant clause. Rather, it involves a specific probation condition that restricts the exercise of a constitutionally permissible right because defendant must be supervised for rehabilitation and prevention of crime. *Riley* is therefore inapposite since it arose in a different Fourth Amendment context. *Riley* also did not consider the constitutionality of conditions of probation, parole, or mandatory supervision. As noted, persons on probation do not enjoy the absolute liberty to which every citizen is entitled and the court may impose reasonable conditions that deprive an offender of some freedoms enjoyed by law-abiding citizens. (*United States v.*

Knights (2001) 534 U.S. 112, 119 (*Knights*) [probationers]; see *In re Q.R.* (2017) 7 Cal.App.5th 1231, 1238, review granted Apr. 12, 2017, S240222 [*Riley* involved a person's "preconviction expectation of privacy"].)

While searches involving electronic devices may raise unique issues of privacy not found in searches of these more traditional categories, we see no need to depart from our well-established treatment of search conditions whenever the condition implicates electronic devices. "[C]ourts have historically allowed parole and probation officers significant access to other types of searches, including home searches, where a large amount of personal information—from medical prescriptions, banking information, and mortgage documents to love letters, photographs, or even a private note on the refrigerator—could presumably be found and read. [Citations.] In cases involving probation or parole house search conditions, we have found no instances in which courts have carved out exceptions for the same type of information [the minor] argues could potentially be on his electronics." (*J.E.*, *supra*, 1 Cal.App.5th at p. 804, fn. 6.) Nothing in the record here justifies narrowing the challenged Search Condition.

F. *No-Contact Conditions*

Defendant claims that the No-Contact Conditions, which forbid association with "'any unrelated person you know to be . . . a gang member'" and "'any unrelated person you know to be a possessor, user or trafficker of controlled substances'" are unconstitutionally overbroad. She further asserts that the No-Contact Conditions limit

her First Amendment right of association because the conditions are not narrowly tailored to a compelling state interest.

The United States Constitution generally protects freedom of association, certain symbolic or expressive conduct, and the liberty to make certain intimate personal choices (see U.S. Const., Amends. 1, 14; *Roberts v. U.S. Jaycees* (1984) 468 U.S. 609, 617-618 [freedom of association receives protection as a fundamental element of personal liberty and as an aspect of the First Amendment]). Nevertheless, reasonable probation conditions may infringe upon constitutional rights provided they are closely tailored to achieve legitimate purposes. (See *Olguin*, *supra*, 45 Cal.4th at p. 384; *Sheena K.*, *supra*, 40 Cal.4th at p. 890; see *Knights*, *supra*, 534 U.S. at p. 119 ["Inherent in the very nature of probation is that probationers 'do not enjoy "the absolute liberty to which every citizen is entitled."'"].)

The California Supreme Court has observed that "restrictive probation conditions" analogous to a condition of probation barring a defendant from associating with criminals and drug users "have been upheld even though they clearly affect a probationer's associational rights. (See, e.g., [*Lopez*, *supra*, 66 Cal.App.4th at pp. 628-629] [condition prohibiting association with known gang members]; *People v. Peck* (1996) 52 Cal.App.4th 351, 363 [condition prohibiting association with known possessors, users, or traffickers of controlled substances who were unrelated to probationer]; *People v. Garcia* (1993) 19 Cal.App.4th 97, 101-103 [(*Garcia*)] [condition prohibiting association with known users or sellers of narcotics, felons, or ex-felons]; *People v. Wardlow* (1991) 227

Cal.App.3d 360, 366-367 [condition prohibiting association with child molesters].)" (*Olguin, supra,* 45 Cal.4th at p. 385, fn. 4.) Nonetheless, probation conditions restricting constitutional rights are scrutinized for overbreadth.

In *Garcia, supra,* 19 Cal.App.4th 97, an appellate court determined that "[a] condition of probation that prohibit[ed] appellant from associating with persons who, unbeknownst to him, have criminal records or use narcotics" was unconstitutionally overbroad because it forbid "association with persons not known to him to be users and sellers of narcotics, felons or ex-felons." (*Id*. at p. 102.) The court modified the condition to provide that he was "not to associate with persons he *knows* to be users or sellers of narcotics, felons or ex-felons." (*Id*. at p. 103, italics added.)

In *Lopez, supra*, 66 Cal.App.4th 615, the defendant was subjected to the following probation condition: "'The defendant is not to be involved in any gang activities or associate with any gang members, nor wear or possess, any item of identified gang clothing, including: any item of clothing with gang insignia, moniker, color pattern, bandanas, jewelry with any gang significance, nor shall the defendant display any gang insignia, moniker, or other markings of gang significance on his/her person or property as may be identified by Law Enforcement or the Probation Officer.'" (*Id*. at p. 622.) The appellate court found that the probation condition was unconstitutionally overbroad because it prohibited him "from associating with persons not known to him to be gang members" and "from displaying indicia not known to him to be gang related." (*Id*. at

pp. 628-629.) The court modified the condition by inserting a *knowledge* requirement. (*Id*. at p. 638.)

In *O'Neil*, *supra*, 165 Cal.App.4th 1351, the terms of probation included a condition forbidding the defendant from associating "'with any person, as designated by your probation officer.'" (*Id*. at p. 1354.) The appellate court determined that the condition was unconstitutionally overbroad in two respects. (*Id*. at p. 1357.) The first problem was that the restriction on association was not expressly limited to those persons that the defendant knew had been designated by his probation officer. (*Ibid*.) The second defect was that the condition did not "identify the class of persons with whom defendant may not associate" or "provide any guideline as to those with whom the probation department may forbid his association." (*Id*. at pp. 1357-1358.)

Here, unlike *Garcia*, *Lopez*, and *O'Neil*, the No-Contact Conditions include a knowledge requirement. The No-Contact Conditions direct defendant to not associate with people she knows to be the type engaged in criminal activity. The conditions prevent defendant from associating with people who are on active probation or parole, who are in gangs, and who use and traffic in controlled substances. The No-Contact Conditions therefore are rationally related to the state's interest in reforming and rehabilitating defendant. Moreover, the No-Contact Conditions do not place defendant "completely at the mercy" of the probation officer. (*Penoli*, *supra*, 46 Cal.App.4th at p. 308.) If she is "concerned about particular risks" arising from the No-Contact Conditions, she may "seek judicial intervention—by moving to modify the probation

order . . . if and when the probation officer seeks to exercise the delegated authority. [Citation.]" (*Ibid.*; see § 1203.3, subd. (a).)

Moreover, as defendant acknowledges, probation conditions forbidding probationers to have contact with gang members or those he or she knows to be users of narcotics have been found constitutional. (See *Garcia*, *supra*, 19 Cal.App.4th at pp. 102-103; *Lopez*, *supra*, 66 Cal.App.4th at pp. 627-628.) Defendant claims that the record shows "no gang membership by [defendant] or her family, or any criminal history reflecting ties to gang activity or to people possessing, using or trafficking controlled substances." To the extent defendant challenges the No-Contact Conditions *as applied* to her, we reject defendant's claim as she did not object to imposition of the No-Contact Conditions. (See *Welch*, *supra*, 5 Cal.4th at p. 236.)

Based on the foregoing, we find the No-Contact Conditions to be neither unconstitutionally vague nor overbroad.

IV

DISPOSITION

The case is remanded to the Riverside County Superior Court with directions to modify the Police Contact Reporting Condition, consistent with the views expressed in this opinion. In all other respects, the judgment in both cases are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

MILLER
Acting P. J.

SLOUGH
J.